

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
PETITION FOR  
REHEARING**



77-1004

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

B  
P/s

-----X  
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Docket No. 77-1004

ANTONIO FLORES,

Defendant-Appellant.  
-----X

On Appeal from the  
United States District Court  
for the  
Southern District of New York

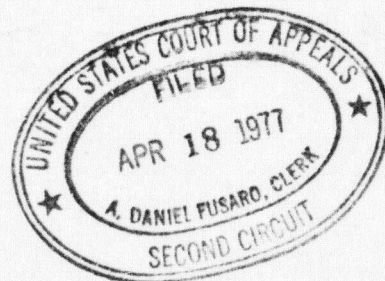
PETITION FOR REHEARING  
WITH A SUGGESTION FOR  
REHEARING EN BANC

11/18

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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Defendant-Appellant.

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PETITION FOR REHEARING  
WITH A SUGGESTION FOR  
REHEARING EN BANC

To the United States Court of Appeals for the Second Circuit:

On April 4, 1977, this Court affirmed appellant's convictions by reading a written decision from the bench. Appellant submits this petition for rehearing, especially for rehearing en banc on the claim that this Court did not consider a letter from the First Secretary of the Embassy of Spain, dated April 2, 1977, and received by appellant's assigned counsel on April 6, 1977 (see letter attached hereto as Exhibit A) despite the fact appellant's counsel requested the Court to withhold any decision until receiving same. This letter further substantiates appellant's contention that formal letters of protest were sent from the Embassy of Spain to the United States



Department of State on April 7, 1976 and September 29, 1976.

The letter also states:

Furthermore, we have in this Embassy's files the complete procedural history of this case.

It is respectfully submitted that the significance of the letters of protest from the Embassy of Spain and the Embassy's continued concern over the instant case was not considered by this Honorable Court when the decision to affirm the conviction was handed down from the bench. This issue was expounded in Point I of the brief submitted by the Appellant.

Appellant also moves for a rehearing en banc because of the failure of the Appellate Bench that sat on the instant appeal to consider all of the briefs, appendices and material submitted on this case. Specifically in the pre trial Appeal of this matter both the United States Attorney's office and Appellant submitted Appendices (76-1195, United States v. Flores, 538 F 2nd 939 (Second Circuit), 1976). Appellant's brief at page 1 in a Note to the Court as per instructions of the clerk of the Court asked that the prior materials be considered:

Defendant respectfully requests that this Honorable Court take judicial notice pursuant to Rules 28 and 30 of the Federal Rules of Appellate Procedure of all previously filed briefs and exhibits in the instant case

including but not limited to Petition for Writ of Mandamus and Exhibits filed by Defendant, Appeal by Government and Appendix Answering Brief and Appendix of Defendant, Defendant's Motion for Rehearing en banc and exhibits, etc. filed under docker no. 76-1195.



THE FACTS OF LAW SUBMITTED BY FLORES ON APPEAL WERE NOT CONSIDERED BY THE COURT, SPECIFICALLY THE COURT RELIED ON MISREPRESENTATION OF THE APPELLEE THAT FORMAL LETTERS OF PROTEST WERE NOT SUBMITTED BY THE SOVEREIGN NATION OF SPAIN.

This petition will circulate to judges who did not sit and/or consider the instant appeal. For said reason a brief summarization of the crucial facts of the instant appeal and the law relied upon will be stated because the decision of the Court read to counsel has not been made available to counsel despite the fact that a duly written request for a copy of the oral decision pursuant to the clerk of this Court's instructions was filed.

Antonio Flores, the appellant herein, was extradited from Spain pursuant to a written decision of the High Court of Spain (please see Appendix to main brief A76 - A83) and pursuant to a formal promise of the United States Department of State, on behalf of the United States Department of Justice (see Appendix to main brief A89). The appellant and the sovereign nation of Spain relied on the latter noted formal promises under international law, when they permitted Flores to be extradited to the United States.

The aforementioned promises of the United States and the decision of the High Court of Spain insured that Antonio

Flores would only be extradited to be tried in the Southern District of New York for an express period of time, specifically his extradited was

expressly limited with respect to time to the acts committed between September 3, 1970 and April 30, 1971 excluding any previous or subsequent acts (emphasis added). . . and it is understood that the extradition is contingent upon the formal promise of the United States Government that the aforesaid person will not be prosecuted for previous offenses foreign to this extradition request unless he expressly consents to such prosecution.

Decision of the High Court of Spain  
(See Appendix to main brief A76 - A 83  
and pps. 3 - 4 of Appellant's brief)

Over 90% of Flores' trial dealt with acts or things falling outside of the period of limitation between September 3, 1970 and April 30, 1971.

The sovereign nation of Spain protested the trial of Flores for acts falling outside the period of time between September 3, 1970 and April 30, 1971 by filing formal protests with the United States. The prosecutor at oral arguments of the pretrial appeal "hoodwinked" the bench, Justices Mansfield, Oakes and Gurfein, by stating that there were no formal protests. The Court relied on the prosecutors misrepresentation:

Appellee seeks to bolster this suggestion by presenting two letters from the Spanish Counsel



General in New York, both addressed "To Whom It May Concern" and sent "(a)t the request of" Flores' wife, which appellee labels formal notes of protest to the action of the government in seeking to broaden its proof against Flores. We do not find these letters to be persuasive, let alone compelling, evidence of Spain's official displeasure. Cf. Fiocconni v. Attorney General, supra.

The government at oral argument labelled these communiques as unofficial letters prompted by Flores' family and denied that the State Department has received formal notes of protest from Spanish authorities. We are inclined to accept this representation by the government in deciding whether these documents are official intergovernmental communiques.

United States v. Flores, supra at 945.

In fact there were formal protests filed by Spain (see Appendix to main brief A69, A70 - A71, A72 - A75, A85 and A86).

Based on said misrepresentations of the prosecutor, the Bench in the instant appeal also refused to consider the law stated in Fiocconni v. Attorney General, 462 F2nd 475 (2nd Cir, 1972) cert. denied 409 US 1059 (1972) and United States ex rel Lugan v. Gengler 510 F2nd 62 (2nd Cir, 1975), cert. denied 95 S.Ct. 2400 (1975), specifically that if a country files an "affirmative protest," as here, there would be a "breach of faith by the United States" requiring a dismissal of the indictment.

CONCLUSION

There should be a rehearing en banc. On such rehearing the violation of the rights of the defendant under international law as insured by the "supremacy clause" and the formal protests of Spain should be recognized and the indictment dismissed.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Stuart R. Shaw".

Stuart R. Shaw

600 Madison Avenue  
New York, New York 10022  
Attorney for Appellant

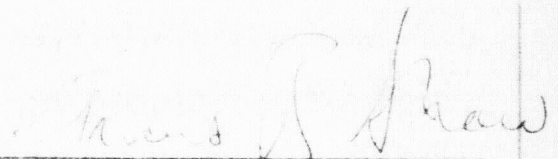


CERTIFICATE

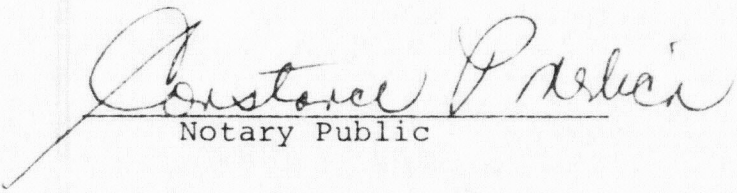
STATE OF NEW YORK )  
COUNTY OF NEW YORK ) SS.:

STUART R. SHAW, being first duly sworn, on oath  
certifies and says:

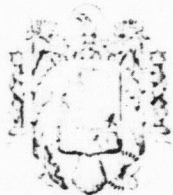
That he is the attorney for appellant Antonio Flores  
in this cause; that he makes this certificate in compliance  
with the rules of this Court; that in his judgment the within  
and foregoing petition is well founded and is not frivolous or  
interposed for delay.

  
STUART R. SHAW

(Subscribed and sworn to before me this 11 day of April  
1977.)

  
Notary Public

CONSTANCE P. MEDICA  
Notary Public, State of New York  
No. 03 7880580  
Qualified in Queens County  
Commission Expires March 30, 1980



Embajada de España

MOST URGENT/SPECIAL DELIVERY

By Stuart R. Shaw

Washington, April 2, 1977

Stuart R. Shaw, Esquire  
600 Madison Avenue, 23rd floor  
New York, New York 10022

RE: United States of America  
vs  
Antonio Flores

Dear Mr. Shaw:

With reference to the case of the United States of America versus Antonio Flores, I have the pleasure of enclosing herewith photocopies of the following Verbal Notes, sent to the Department of State by this Embassy:

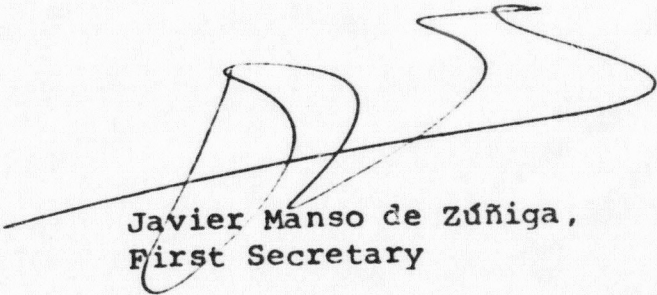
Note Number 38, of April 7, 1976  
Note Number 280, of September 29, 1976  
Note from the Department to this Embassy dated June 1, 1976

Furthermore, we have in this Embassy's files the complete procedural history of this case.

With all good wishes, I remain,

Yours sincerely,



  
Javier Manso de Zúñiga,  
First Secretary

Enclosures (a/s)

EX. A

L/50





The Department of State refers to Note Number 38 from the Embassy of Spain, dated April 7, 1976, concerning the trial of Antonio Flores following his extradition from Spain. The Department of State has obtained the enclosed report from the Department of Justice on this matter.

From that report, it is evident that Mr. Flores is not being prosecuted for activities prior to September 3, 1970, but the prosecution has offered, and the court has accepted, evidence of Mr. Flores' illegal activities prior to that date to show his guilty knowledge and intent with respect to illegal acts committed subsequent to September 3, 1970.

It is the view of the Department of State that the use by the District Court of this evidence for the purpose indicated does not constitute detention, trial or punishment of Mr. Flores for activities prior to September 3, 1970, for purposes of Article XIII of the Treaty on Extradition between the United States of — America and Spain ~~signed at~~ Madrid on May 29, 1970, and is consistent with the judicial decree from the Audiencia Territorial of Barcelona.

Enclosure:

U.S. Department of Justice Letter.

Department of State,

Washington,

June 1, 1976



Page 2  
Number 28

The Embassy of Spain presents its compliments to the Department of State and has the honor to inform that in reference to the judicial process by the U.S. District Court, Southern District of New York, against the North American citizen Antonio Flores, whose extradition was approved by Spain, by judicial decree from the "Audiencia Territorial" of Barcelona, Spain, The Honorable Judge Dudley B. Bonsal has granted the petition of the U.S. Attorney for the Southern District of New York allowing the presentation of acts and evidences committed prior to September 3, 1970.

Inasmuch as the judicial decree by the Spanish judicial authorities conditioned the extradition of the said North American citizen to be judged only and exclusively for the assumed offense of conspiring to brake the Sections 173 and 175 of the Title 21 of the U.S. Law Code and only by offenses committed during the period between September 3, 1970 and April 30, 1971, conditions formally assured by the U.S. Government in the Verbal Note No. 136 dated February 13, 1974 issued by the U.S. Embassy in Madrid, the Embassy of Spain requests the Department of State to inform the Department of Justice about this matter in order to assure the fulfillment of the content of the above mentioned Verbal Note.

✓...





2.

Attached it is included the judicial decree of extradition, the Verbal Note Nr. 136 as well as their translations and the decision of the U.S. Judge of the U.S. District Court.

The Embassy of Spain avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., April 7, 1976

Department of State  
Special Consular Services  
Washington, D.C.





COPY RECEIVED  
APR 18 1977  
ROBERT B. FISKE JR.  
U.S. ATTORNEY  
SO. DIST. OF N.Y.